

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TREVOR HINKLE**

Claimant

VS.

**SOGETI USA LLC**

Respondent

AND

**NEW HAMPSHIRE INS. CO.**

Insurance Carrier

Docket No. 1,047,114

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the November 20, 2009, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts. Joshua P. Perkins, of Kansas City, Missouri, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured in an accident that arose out of and in the course of his employment, and that claimant's accident did not fall into the purview of the going and coming rule. Respondent was ordered to provide claimant with medical treatment with Dr. Alexander Bailey.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 19, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Respondent requests review of whether claimant sustained personal injury by accident that arose out of and in the course of his employment. Respondent contends the going and coming rule bars claimant's request for benefits.

Claimant argues that the going and coming doctrine has no application to this case as he was performing his work duties at the time of his slip and fall in the parking garage. Accordingly, claimant asks that the ALJ's Preliminary Decision be affirmed.

The issue for the Board's review is: Did claimant sustain personal injury by accident that arose out of and in the course of his employment or is he prevented from receiving workers compensation benefits under the going and coming rule?

#### **FINDINGS OF FACT**

Claimant works for respondent as the Director in IT Consulting. This is a salaried position, and he has no set hours. At times, he works away from the office at client sites or from his home. When he is working at his office, he parks his car in a parking garage that is connected to the building by a breezeway. He does not have a reserved spot but testified that he was instructed to park on the top floor of the parking garage. He said he was told not to park in the front of the building because that area was for clients' use. Claimant said that to get to the parking garage from his office, he would come down the elevator to a lobby that leads out to the breezeway. From the breezeway, he would go to the stairs to the parking garage. He would then climb up the stairs to the second story of the parking garage, the top floor, where he parked.

On January 14, 2009, claimant was in his office working on a presentation. He testified that about 4 p.m., he went out to his car to get a pin drive to use in his project. When he got to the second floor of the parking garage, he slipped and fell on some ice. He landed on the concrete floor and injured his mid back and right knee. Claimant said he remained on the floor of the parking garage a short while and then got up and went to his car. He said he sat in his car awhile because he was in pain. He then decided to take his work home, so he left in his car and drove home.

Claimant testified that his intention, before he fell, was to take the pin drive back to his office and continue working in his office. After he fell, however, it was cold and icy, and claimant's back was hurting him. He said he did not feel like climbing the stairs again, so he decided to go home. He continued to work on his project later that evening at home. The next morning, January 15, claimant sent an email to respondent in which he stated: "I slipped and fell as I was leaving the office yesterday. . . ."<sup>1</sup>

Claimant acknowledged that he had treated with Dr. Simon before January 14, 2009, for his low back but denied he had ever had any injury to his thoracic spine or mid back. He also denied having any symptoms or problems with his thoracic spine region before this accident.

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<sup>1</sup> P.H. Trans., Resp. Ex. D.

Jack Accurso, a vice president of respondent, is in charge of respondent's Kansas and Missouri operations. Mr. Accurso testified that respondent had no policies indicating where employees are to park. In addition to parking on the roof of the parking garage, employees can purchase covered parking or park for free in front of the building, with the exception of a row of spots in the front designated as visitor parking. Other than the area for visitors, the remainder of the parking lot is used by employees of the tenants of the building. Respondent has only one designated parking spot, and that is a spot set aside for Mr. Accurso as head of the office. That spot is in the covered space on the first level of the parking garage.

Although Mr. Accurso said that he and claimant have worked together for six years and that he has not known him to be dishonest or untruthful, respondent argues that claimant is not credible. Respondent points to claimant's testimony where he denied a previous injury to or problems with his mid back but notes a medical report of Dr. Steven Simon dated December 3, 2008, indicates claimant had pain in the left mid back at that time. Also, respondent notes that the March 3, 2009, report of Dr. Frederick Grossman stated that claimant had "no history of sexual or substance abuse and no history of emotional problems"<sup>2</sup> but noted that claimant had previously entered a detox center and also had been seen at The Lemons Center. Claimant denied making a statement to Dr. Grossman concerning whether he had a history of substance abuse. Claimant stated that he checked himself into a detox center because he was concerned about the amount of narcotics being used to treat him for his multiple knee surgeries, his previous neck fusion, and his chronic pain syndrome. He said he was seen at The Lemons Center in February 2007 due to stress he was having at work. Respondent pointed out that medical records from The Lemons Center indicate that claimant said he had experienced depression related to his pain situation, but claimant said that was an inaccurate statement. Claimant also said he did not remember a conversation in October 2008 with Dr. Stewart Grote about a possible altered prescription, but Dr. Grote's medical note of October 9, 2008, indicates that claimant "vehemently" denied trying to fill an altered prescription.<sup>3</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

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<sup>2</sup> P.H. Trans., Cl. Ex. 3 at 2.

<sup>3</sup> P.H. Trans., Resp. Ex. C at 3.

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>6</sup>

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.<sup>7</sup> In *Thompson*,<sup>8</sup> the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which

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<sup>4</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>6</sup> *Id.* at 278.

<sup>7</sup> *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

<sup>8</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.<sup>9</sup> Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.<sup>10</sup>

The Kansas appellate courts have held that the "going and coming" rule, does not apply in cases where the worker is injured while traveling in or operating a motor vehicle on a public roadway and the operation of the vehicle or travel is an integral part or is necessary to the employment.<sup>11</sup>

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. The undersigned Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>13</sup>

### ANALYSIS

It is not alleged that the location of claimant's slip and fall was the premises of the employer. Rather, it is claimant's contention that the going and coming rule is inapplicable to the facts of this case because claimant was not leaving work to travel home. Instead,

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<sup>9</sup> *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer.

<sup>10</sup> *Id.* at 40.

<sup>11</sup> *Halford v. Nowak Construction Company*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* \_\_\_ Kan. \_\_\_ (2008); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

<sup>12</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>13</sup> K.S.A. 2008 Supp. 44-555c(k).

claimant was walking to his car to retrieve a pin drive that he needed for the project he was working on in his office. Before the accident happened, his intention was to return to his office. The ALJ found:

The evidence is uncontroverted that claimant was working in respondent's office preparing a sales presentation for a co-worker on the date of accident. At approximately 4:00 p.m., Claimant proceeded to his personal vehicle to retrieve a "pin drive" that contained data needed to complete his project. While proceeding to his car, he slipped on ice. Claimant has a long history of right knee surgeries and low back surgery. These conditions were aggravated in the slip and fall on the ice. Claimant "hobbled" to his vehicle following the fall, and rather than try to negotiate the stairs to return to the office, he entered his vehicle and went home. It was claimant's intention prior to the fall to return to the office to complete the sales presentation. Claimant completed the sales project from his home and e-mailed Jack Accurso, vice president of respondent, regarding his injury.

The court finds that claimant's slip and fall on ice arose out of and in the course of his employment. There is no evidence in the record to suggest that claimant was leaving work for the day that would make this scenario subject to the going and coming rule. Respondent is ordered to provide medical treatment with Dr. Bailey and his referrals.<sup>14</sup>

Respondent contends that the email claimant sent to his supervisor the day after his accident contradicts claimant's testimony that he planned to return to his office. Instead, it shows that claimant was intending to go home. As did the ALJ, this Board Member accepts the sworn testimony of claimant over the language of the email. The email was intended to alert claimant's supervisor of his injury. It was not intended to be a detailed report of the facts surrounding the accident. Furthermore, a review of the record compiled to date does not indicate that claimant is untruthful or that his testimony should not be believed.

### **CONCLUSION**

Claimant's accident and injury arose out of and in the course of his employment with respondent.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated November 20, 2009, is affirmed.

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<sup>14</sup> ALJ Preliminary Decision, November 20, 2009, at 1-2.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2010.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Joshua P. Perkins, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Marcia L. Yates Roberts, Administrative Law Judge